

DISTRIBUTABLE (71)

SERVCOR (PRIVATE) LIMITED
v
TARISAI MUCHENJERI

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GUVAVA JA
HARARE: JUNE 13, 2014

T. Mpofu, for the appellant

P. Mabundu, for the respondent

GUVAVA JA: This is an appeal against a judgment of the Labour Court wherein the appellant was ordered to reinstate the respondent without loss of salary or benefits.

After hearing argument from both parties we made the following order:

1. The appeal be and is hereby allowed with costs.
2. The order of the Labour Court be and is hereby set aside and replaced with the following:

“The appeal is dismissed with costs”.

We indicated the reasons would follow in due course. These are they.

The facts of the matter leading to this appeal may be summarized as follows: -

The respondent was employed by the appellant as a Supervisor of the Colcom branch in Harare. He was also the Chairman of the worker's committee. During the course of his employment the respondent had a disagreement with a client. This altercation made it necessary for him to be moved to head office pending reassignment to another branch wherever a vacancy arose.

By letter dated 8 February 2011 authored by the Operations Manager, Mr Gamble, respondent was advised that he had been transferred to the Selous branch in Chegutu effective from Monday 14 February 2011 as a Kitchen Supervisor in Grade 10. The appellant undertook to provide transportation to relocate him and provide him with accommodation and three meals per day while (he is) on duty.

The respondent resisted the transfer, stating challenges that he would face with relocation. He refused to sign the letter of 8 February and did not collect his copy of the letter. The appellant wrote a subsequent letter to the respondent on 10 February 2011, acknowledging that he had refused to sign or accept the letter of transfer. The appellant further advised the respondent that he was expected to comply with the instruction of transfer as the necessary travel arrangements had already been made for him. Again, the respondent refused to sign the letter acknowledging receipt and refused to retain a copy.

The respondent thereafter wrote to the appellant on 17 February 2011 explaining his opposition to the transfer. He articulated his resistance to the transfer as follows:

1. He objected to the tone of the letter of transfer which suggested the transfer was mandatory and not open to negotiation.
2. He argued that the employer departed from the general practice adopted in filling positions in centres out of town where they are first advertised internally and interested employees apply for the post.
3. He stated that he believed there was capable staff already stationed at the branch.
4. He highlighted that he was a family man with three children and he would not be able to afford such a move
5. He believed he ought to have been consulted before a final decision was made on the matter.

The appellant responded on 17 February 2011 referencing the letters of 8 and 10 February 2011 where the respondent had refused to acknowledge receipt of the letters from the employer. The appellant reiterated that the respondent was expected to report for duty at his newly assigned branch on 21 February and the company bus would take him to Selous that very morning. The appellant further warned that failure by him to comply would force the institution of disciplinary proceedings. Again, the respondent refused to sign this letter and refused to transfer to Selous.

On 23 February 2011, having failed to avail himself for duty as he was called upon to do, the respondent was charged with willful disobedience of a lawful order in contravention of

s 1.8.11.3 of the appellants' code of conduct. On the same date, the respondent was notified that the disciplinary hearing would be held on 2 March 2011.

The respondent, by letter dated 24 February 2011 requested that the hearing be postponed to 10 March 2011 as he would be out of town on the assigned date. The request was granted by the appellant. The appellant however brought it to the respondent's attention that the postponement would result in the hearing being held outside the fourteen days stipulated in the Code. Following the agreed postponement, the hearing had to be postponed a second time to 16 March 2011 because the worker's committee had suspended all worker's committee business including participation in disciplinary hearings.

The disciplinary hearing was then convened on 16 March 2011 to address charges laid against the respondent. The respondent pleaded not guilty. After hearing both parties the committee held that the respondent had an obligation to obey the order and thereafter raise his objections to the transfer formally.

It was the respondent's argument that he had spoken to Mr Gamble with regards to his transfer after receiving the first letter of transfer and believed the matter had been settled in his favour. However, the chairperson of the disciplinary hearing pointed out that the letters of transfer were themselves written by Mr Gamble. Mr Gamble testified that what he had agreed with the respondent was that he should move to Selous and the appellant would consider his request if a vacancy was to avail itself closer to his home. He also gave him assurances that he would only work for a seven-day week and be off for the next seven days with the company catering for his

transportation to and from Selous. Mr Gamble made it clear that although generally vacant positions are advertised, when there are unassigned staff the company considers them as a matter of priority as they employ staff to “work and produce and not to sit and earn salary for no work done.”

The Committee found the respondent guilty of the misconduct. It also took a serious view of the misconduct and dismissed him from employment.

The respondent approached the Servcor Appeals Committee which convened on 25 March 2011. It upheld the decision of the disciplinary committee on 29 March 2011 finding that the proper disciplinary procedures had been followed.

The respondent then appealed to the Labour Court where he contended that the transfer from the head office to the Selous branch was unlawful and went against the *audi alteram partem* Rule. He argued that the transfer was a unilateral decision which had been taken by the appellant. He thus submitted that it was for those reasons that he did not sign the transfer papers. The appellant submitted that the respondent had voiced his concerns to his immediate supervisor therefore he had been heard. The refusal to sign the transfer papers constituted refusal to obey a lawful order. The employer further argued that if the respondent had any genuine concerns he ought first to have complied with the transfer then file a complaint once transferred.

The court *a quo* observed that the respondent was given three days’ notice prior to the transfer to comply with the order and subsequent letters were written compelling him to

comply. The appellant acknowledged that the respondent is a married man, with children of school going age who were based in Harare. The appellant undertook to cover the respondent's transport costs, meals and accommodation costs. These costs did not include his family.

The court *a quo* found in favour of the respondent on the basis that the transfer had not been handled in a procedurally correct or fair manner and as such it was improper. It ordered a return to the status *quo ante* pending the proper process of transfer being engaged or damages for premature loss of employment.

The appellant was aggrieved by this decision and appealed on grounds that in my view raise the following issues for determination by this court:

1. Whether or not the court *a quo* properly addressed the question of procedural irregularities?
2. Whether or not there was willful disobedience of a lawful order?

I will address each question in turn.

1. Whether or not the judgment of the court *a quo* properly addressed the question of procedural irregularities.

The court *a quo* in its judgment did not take issue with the actual disciplinary hearing process and findings. It took issue with the employer's conduct which necessitated the disciplinary hearing. It held that a notice period of three days was inadequate and as such it constituted a procedural irregularity.

Mr *Mpofu* for the appellant argued that the court *a quo* concluded that the three-day notice period was a procedural irregularity that constituted a ground for review. He made the point that the court *a quo* itself realised that the question of the three-day period, as a reviewable issue, was neither raised nor argued before it, neither was it the basis upon which it had been approached by the respondent. The court *a quo* reasoned as follows:

“...the fact that when he appealed he did not specifically raise the issue of time does not absolve the respondent from dealing with the transfer in a diligent and fair manner...”

The court is also alive to the fact that this procedural flaw was not cited as the main basis upon which the dismissal should be upset”

It is a general principle of our law that a court may raise an issue that arises during the course of proceedings before it. It must however invite the parties to address the issue it has raised before making a decision. The court cannot raise an issue and make a finding on it without hearing counsel on the issue. Such conduct would in effect constitute descending into the arena and arguing a case on behalf of one of the parties. In this respect the court would cease to be an impartial adjudicator. See in this respect *Muzuva v United Bottlers (Pvt) Ltd*, 1994 (1) ZLR 217 (S); *National Foods Ltd v Mugadza* SC 105/95; and *Mpumela v Berger Paints (Pvt) Ltd*, 1999 (2) ZLR 146 (S).

It was apparent in this case that the issue raised by the court *a quo* introduced an entirely new defense for the respondent. If the respondent had been arguing procedural impropriety of the three days’ notice, it would suggest that he was not opposed to transfer but objected to the “short” notice. This was never the respondent’s argument.

It must be stated that when the respondent raised this point before the arbitrator, the appellant made it clear that if that had been the respondent's concern, it would have consented to extending the period for him to transfer. However, this was never the respondent's argument for resisting transfer.

It seems to me that this clearly constituted gross misdirection by the court *a quo* as the decision was based on an incorrect finding of fact. Mr *Mpofu* drew the court's attention to the case of *Proton Bakery (Pvt) Ltd v Takaendesa* 2005 (1) 60 (S) where a similar situation arose before the Supreme Court. In this case GWAUNZA JA made the following:

“The appellant argues, in the light of all this, that the action of the court *a quo* in reaching a material decision on its own, amounted to gross irregularity justifying interference by this court on the principles that have now become trite...

Instead, it went on *mero motu* and after the event, to pick on a procedural irregularity neither raised nor argued before it, and base its determination solely on that technicality... The misdirection on the part of the court *a quo* is left in no doubt. It is in my view, so serious as to leave this Court with no option but to interfere with the determination of the lower court.”

I am persuaded by the appellant's argument. The court *a quo* erred in this regard leaving this court with no option but to interfere with its judgment.

With regards to the argument made by Mr *Mabundu*, on the *audi alteram partem* rule, it must be highlighted that the right to be heard does not mandate an oral or formal hearing. The case of *Metsola v PTC & Anor* 1989 (3) ZLR 147 (S) dealt with what this rule envisages when one speaks of being “heard.” At page 154, the court said—

“The *audi* maxim is not a rule of fixed content, but varies with the circumstances. In its fullest extent, it may include the right to be apprised of the information and reasons

underlying the impending decision; to disclosure of material documents; to a public hearing and, at that hearing, to appear with legal representation and to examine and cross-examine witnesses ... The criterion is one of fundamental fairness and for that reason **the principles of natural justice are always flexible**. Thus the ‘right to be heard’ in appropriate circumstances may be confined to the submission of written representations. It is not the equivalent of a ‘hearing’ as that term is ordinarily understood. [My emphasis]

From the above quotation it is apparent that the respondent was heard on many occasions. These occasions are as follows:

1. Pursuant to the conversation he had with Mr Gamble he was advised as to the reason that he had been selected for transfer, namely there was no malice but he was considered the best suited because of his strength in Western dishes.
2. He was apprised of his employer’s reasoning that it was not productive to the company for him to be idle.
3. His employer addressed his concerns and gave assurances to cover his transportation back to Harare once every other week for a week, and that he would be considered for any opening that would arise nearer to home as soon as it arose.
4. Further, he did also submit written concerns to his employer which were also received.

What is critical to note is that this rule entitles a person to be heard. It does not entitle one to a verdict in their favour once heard. The court *a quo* rightly quoted the case of *Guruva v Traffic Safety Council of Zimbabwe* 2009 (1) ZLR 58 (S) which states the following:

“...although the employee has a right to be heard, and to make representations against the transfer the final decision still lies with the employer. Once it is shown that the employer gave due consideration to the need to transfer an employee and gave the employee a hearing the employer’s decision cannot be held to be improper.” [My emphasis]

It is therefore clear that there was no procedural impropriety in this case.

The court *a quo* also fell into error when it assumed the authority *mero motu* to convert appeal proceedings to review proceedings and proceeded to base its decision on that issue.

The procedure to have a review considered along with an appeal is set out in r 15(3) of the Labour Court Rules, 2006. This Rule states:

“A person making an appeal under this rule who also wishes to seek a review of the proceedings in respect of which he or she makes the appeal shall, at the same time, complete in three copies a notice of review in Form LC 4 and serve such notice together with the notice of appeal under this Rule.”

It is clear from a proper reading of this Rule that this procedure is at the instance of the party that is appealing in the court. This is not the procedure that was adopted in the court *a quo*. For this reason the court *a quo* also erred.

Whether or not there was willful disobedience of a lawful order

It goes without saying that there ought to be a lawful order for this charge to stand. The elements that render an order lawful were elucidated in *ZCTU v Makonese* 2005 (1) 430(S). The court *a quo* established that there was in fact a lawful order in the present case. These are:

- (a) It is given by an employer
- (b) It is capable of being carried out by the employee.
- (c) It is for the advancement of the employer's business
- (d) It is closely related to the duties of that employee;

and

(e) It is not a wrongful act.

The case of *Matereke v CT Bowring & Associates (Private) Limited* 1987 (1) ZLR 206 (S) further highlighted a two pronged test to establish whether or not there had been willful disobedience to a lawful order. The first is that there ought to be deliberate and serious refusal to obey the order, and the second must be that the disobedience must not be trivial. The conduct must be such as to undermine the relationship between the employer and employee.

In casu, there was deliberate, continued and serious refusal to comply by the respondent. The initial letter of transfer was written on 8 February 2011 and communicated to the respondent on 10 February 2011. He refused to sign acknowledging receipt of the letter and refused to collect his copy of the letter.

A second letter was written to the respondent on 10 February 2011 acknowledging his refusal to comply and advising him that in spite of such conduct he was expected to report for duty at the designated branch by 14 February 2011. Respondent again refused to collect a copy of the letter or to sign in acknowledgement of the second letter. The date to report for duty was moved to 21 February 2011. He refused to sign this letter as well and did not report for duty on the stated day. It was only on 23 February that the respondent was then charged with the offence of willful disobedience to a lawful order. At no point did the respondent request more time to be able to comply with the instruction. His position was always to reject and resist the transfer.

The disobedience clearly went to the root of the employment contract. It is common cause that the respondent was of no useful purpose to the employer while stationed at the head office. It is a basic principle of the employment relationship that an employee provides a service for which he or she is remunerated. This is expressed in the definition of the terms employee and employer as per s 2 of the Labour Act [*Chapter 28:01*] as follows:

“employee” means any person who performs work or services for another person for remuneration or reward on such terms and conditions as agreed upon by the parties or as provided for in this Act, and includes a person performing work or services for another person...

“employer” means any person whatsoever who employs or provides work for another person and remunerates or expressly or tacitly undertakes to remunerate him, and includes...”

In casu, the respondent was aware that his placement at the Head Office was temporary pending transfer. As the definition of an employer shows, it is the employer’s duty to provide work to the employee for which service he will be paid. If the employee will not accept the work provided should the employer be bound to continue remunerating him? The respondent’s misconduct clearly goes to the root of the employment relationship. Having met both requirements for this test it is clear that there was willful disobedience of a lawful order. Having made that finding it then follows that the employer was entitled to institute disciplinary proceedings. It is also trite that the penalty for misconduct remains within the employer’s discretion except where abuse of this discretion is alleged and proven.

DISPOSITION

Having made these findings, it cannot be said that the proceedings before the disciplinary committee were not procedural, nor can it be said the decision reached was

unreasonable or unfair. It is trite that such a finding can only be overturned where the court finds gross misdirection by the lower court. In the case of *ZINWA v Mwoyounotsva* 2015 (1) ZLR 935 (S) where it was held that:

“It is settled that an appellate court will not interfere with factual findings made by a lower court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it¹: or that the decision was clearly wrong.”

The Labour Court, sitting as an appellate court was bound by this principle. The Labour Court found that the disciplinary committee was correct in finding that the order given was in fact lawful and the employee was duty bound to obey it.

Ultimately, the position in *Chirasasa v Nhamo N.O & Anor* 2003 (2) ZLR 206 (S) 220B-C perfectly captures the realities of this case. This case held:

“The appellants failed to appreciate that a contract of employment cannot remain static throughout the whole of its existence regardless of the changes in the fortunes of the business. Refusal to accept a change in terms and conditions of employment necessitated by the commercial interests of a business may be a good enough reason for terminating a contract of employment.” [My emphasis]

Accordingly, it was for the above reasons that the appeal was determined.

¹ *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670; *Metallon Gold Zimbabwe v Golden Million (Pvt) Ltd* SC 12/2015.

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

Coglan, Welsh & Guest, appellant's legal practitioner

Mabundu & Company, respondent's legal practitioners